Supreme Court, U.S.
FILED

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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JACK P. BRIGMAN

Petitioner,

v.

CSX TRANSPORTATION, INC.

On Petition For Writ Of Certiorari
To The Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State may constitutionally refuse to permit non-resident claimants such as Brigman from maintaining a suit in the State's Court of competent jurisdiction based solely upon the claimants' residency.

2. Whether a State may constitutionally exclude causes of action such as Brigman's from the State's Courts of Competent Jurisdiction based upon the cause of action's origin in Federal law.

PARTIES TO THE PROCEEDING

Parties

Jack P. Brigman

CSX Transportation, Inc.

Parent Corporations

CSX Corporation

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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JACK P. BRIGMAN

Petitioner,

v.

CSX TRANSPORTATION, INC.

PETITION FOR WRIT OF CERTIORARI

Petitioner Jack P. Brigman respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Circuit Court for the City of Portsmouth, Virginia entered in this action on January 31, 1997.

OPINIONS BELOW

The Parties appeared before the Hon. Johnny E. Morrison, Judge of the Circuit Court for the City of Portsmouth, Virginia, on March 18th, 1996 on Respondent's Motion to Dismiss on the basis of forum *non-conveniens* as codified in the Virginia Code, § 8.01-265. The Court granted defendant's motion and dismissed Petitioner's Action on January 31, 1997. Petitioner's Petition for Appeal of the issues raised herein to Virginia's court of last resort, the Virginia Supreme Court, was denied without comment on August 18, 1997.

BASIS OF JURISDICTION

On August 18, 1997, the Virginia Supreme Court denied Petitioner's Petition for Writ of Certiorari to review the decision of the Portsmouth City Circuit Court, Portsmouth, Virginia. The original jurisdiction of this Court is invoked pursuant to the inherent power granted this Court under the United States Constitution, and Title 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

The United States Constitution, Article VI, Clause 2;

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the land.

The United States Constitution, Article IV, Clause 2;

> [T]he Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Va. Code Annotated, §8.01-265 (Michie 1950), "Change of Venue by Court"

> . . . the court wherein an action is commenced may, upon motion by any defendant and for good cause shown, (i) dismiss an action brought by a person who is not a resident of the Commonwealth without prejudice . . . if the cause of action arose outside of the Commonwealth. . .The provisions of i) of this section shall not apply to causes of action which accrue under §8.01-249(4)

Va. Code Annotated, §8.01-249(4) (Michie 1950), "When cause of action shall be deemed to accrue in certain personal actions."

> The cause of action in the actions herein stated shall be deemed to accrue . . . In actions for injury to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma, or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician.

I. STATEMENT OF THE CASE

A. Procedural Background

Jack P. Brigman ("Brigman"), Petitioner, filed a Motion for Judgment pursuant to 45 U.S.C. § 51, et seq ("FELA") in the Circuit Court of the City of Portsmouth, Virginia, against CSX Transportation, Inc. ("CSX"). Brigman alleged he had suffered personal injuries caused by exposure to various chemical solvents and asbestos dust during his employment by CSX or its corporate predecessors in interest. Brigman is a resident of North Carolina having worked for the Respondent in Hamlet, North Carolina.

On March 18, 1996, the parties appeared before the Honorable Johnny E. Morrison pursuant to a Notice and Motion to Dismiss filed by the Respondent pursuant to § 8.01-265 of the Code of Virginia. Brigman presented a Memorandum of Law in Opposition to CSX's Motion to Dismiss based upon the final sentence of § 8.01-265 which excludes causes of actions for asbestos disease from discretionary dismissal. CSX presented a Memorandum of Law in Support of its Motion to Dismiss and oral argument that Brigman's cause of action accrued under the FELA, not § 8.01-249 of the Code of Virginia, and was not excluded from discretionary dismissal by the language of § 8.01-265. On January 31, 1997, the Honorable Johnny E. Morrison entered an Order granting CSX's motion and dismissing this action. Thereafter, appeal was sought to the Commonwealth of Virginia's Court of last resort, the Supreme Court of Virginia, pursuant to Vir. Const. Art. VI, § 1, and the Rules of Procedure for the Supreme Court of Virginia. This discretionary review was denied, such denial entered on August 18, 1997.

B. Statement of Facts

Brigman was a carman employed by CSX in its Hamlet, North Carolina shops from 1971 to 1995. He has been diagnosed as suffering from asbestosis due to his exposure to asbestos dust while in the employ of CSX. Numerous physicians in the area around Portsmouth, Virginia, have also examined and treated a

neurological impairment Brigman suffers due to his exposure to toxic solvents while employed by the Railroad.

At the hearing upon the defendant's Motion to Dismiss, former State Senator Johnny S. Joannou and former State Delegate William S. Moore, Jr. testified that when the revision to § 8.01-265 was considered by the Virginia Senate and House of Delegates, no evidence or debate was presented concerning the intent to distinguish federal from state causes of action when applying the prohibition of discretionary dismissal to causes of action alleging injury due to asbestos exposure.

Brigman contended in its Petition for Discretionary Review to the Supreme Court of Virginia that the referral by § 8.01-265 to § 8.01-249(4) is simply a description of convenience, and provided the testimony of a State Senator and State Delegate. At the time the statute was amended, no evidence was presented to the Senate or House supporting a delineation between state and federal causes of action. While Virginia had the power to interpret its statute in such a way as to obviate Petitioner's second assignment of error that such a delineation constitutes an impermissible discrimination against Federal causes of action, such an invitation was declined. Therefore, the determination of the lower Court stands as the interpretation to be applied to the subject statutes. Garna v. Louisiana, 368 U.S. 157, 166 (1961).

Following the presentation of the testimony of the witnesses Judge Morrison granted the Motion to Dismiss this cause of action. The parties contested the wording to be included in the Dismissal Order with the Order finally being entered by Judge Morrison on January 31, 1997.

II. REASONS WHY THE WRIT MUST BE GRANTED

A. *INTRODUCTION: THERE IS A MANIFEST NECESSITY FOR THIS COURT TO DETERMINE THE ISSUES HEREIN PRESENTED.*

Several of the States of the Union are systematically depriving American Citizens of a fundamental right that this Court has determined is unequivocally guaranteed under the United States Constitution – the right of citizens and residents of one state to access the Courts of another.[1] The existence of this discrimination may fairly be ascribed in part to the States misguided reliance upon an ancient case (Douglas v. New York, N.H. & H. R. Co., 279 U.S. 377, (1929)), the basis of which has long been overruled by this Court. Only a ruling directly on this issue will provide guidance necessary to clarify this Court's past rulings so that this discrimination will cease.

In addition, Virginia has determined that it may constitutionally deprive claimants access to its Courts of competent jurisdiction solely upon the Federal source of the right to be asserted. At least one state, on facts identical to those presented by this petition, has determined that such a distinction is unconstitutional. Russell v. CSX Transportation, Inc., 689 So.2d 1354(1997).

In Russell, the claimant brought a suit under the Federal Employers' Liability Act in the Parish of Orleans of Louisiana for an injury which occurred in Waycross, Georgia. The defendant Railroad moved for dismissal of the action pursuant to La. Code Civ. P. Art. 123 B which, as interpreted by the Louisiana Supreme Court, limited dismissal on the basis of forum *non-conveniens* to "actions predicated solely upon federal statutes." Id. at 1358. The Court, after applying this Court's precedent and arguments identical to those argued to the Supreme Court of

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[1] *See e.g.* Gardner v. Norfolk & Western Rwy. Co., 179 W. Va. 724, 372 S.E.2d 786 (1988) and cases cited therein.

arguments identical to those argued to the Supreme Court of Virginia, found the statute created an impermissible discrimination because:

> . . . foreign causes of action based on state law must be entertained by Louisiana courts where jurisdiction is otherwise proper, whereas a similar suit based on federal statute may be dismissed . . . with the sole difference being that the latter is based on federal statute.

Id. at 1358.

The Russell ruling is on all fours with the issues presented to the Virginia Supreme Court and the Virginia Supreme Court, in the face of that ruling squarely supporting the Petitioner, chose to ignore the matter altogether without comment. There is now a discrepancy between the several States as to what enforcement, if any, shall be given to the Constitution's grant of Supreme Power to the Federal Government, which this Court has determined dictates that State Courts of competent jurisdiction shall not discriminate upon causes of action based upon their source in Federal law. This Court's guidance is necessary to harmonize the rulings of the Several States on this important issue of Federal and Constitutional law.[2]

B. THE DECISION BELOW IS REPRESENTATIVE OF A COMMON DISCRIMINATION OF THE SEVERAL STATES AGAINST CLAIMANTS SEEKING RE-DRESS IN COURTS OF COMPETENT JURISDICTION BASED SOLELY ON IMPERMISSIBLE CLASSIFICATIONS BASED UPON RESIDENCY OF THE CLAIMANT IN VIOLATION OF THE DICTATES OF THE COMITY CLAUSE OF THE UNITED STATES CONSTITUTION

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[2] No appeal of the Russell ruling has been sought to this Court, and the time for such an appeal has elapsed.

Article IV, Section 2 of the United States Constitution, commonly referred to as the "Privileges and Immunities Clause," or "Comity Clause," provides that "the Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The purpose of Article IV was principally to "help fuse into one Nation a collection of independent, sovereign states." Toomer v. Witsell, 334 U.S. 385, (1948).

The Virginia venue statute, § 8.01-265, permits a "resident" to bring a suit in Virginia regardless of the situs of the occurrence giving rise to the suit. When such a suit is brought, the statute guarantees that a Virginia resident litigant's cause of action shall not be dismissed and shall be afforded the benefit of the Virginia forum. The Virginia venue statute, however, specifically permits discretionary dismissal of a claim by a "non-resident" under an identical factual scenario.

Whether such a provision is permissible under the Privileges and Immunities Clause of the United States Constitution was first decided by this Court in Douglas v. New York, N.H. & H. R. Co., 279 U.S. 377, (1929). The Douglas case concerned a New York civil procedure statute which permitted the court in its discretion to "dismiss an action by a citizen of another state but not an action brought by a citizen of New York, which last it cannot do." Id. 49 S. Ct. at 356. The Douglas court construed the New York statute narrowly finding that it discriminated on the basis of "residency" and not "citizenship." Since the Privileges and Immunities Clause applied only to discrimination based upon "citizenship" and did not apply to the questioned statute which dealt only with "residency" the statute was found to be Constitutionally acceptable Id. This Court's Douglas decision became authority upon which States have permitted discrimination against non-residents on the basis of *forum non-conveniens*. See generally, Norfolk & Western Rwy. Co. v. Tsapis, 184 W. Va. 231, 400 S.E.2d 239, 241-42 (W. Va. 1990).[3]

[3] Tsapis was a rehearing to consider the holding of a previous case, Gardner v. Norfolk & Western Rwy. Co., 179 W. Va. 724, 372 S.E.2d 786 (1988). In Gardner, the Court found that West

However, the eroding distinction in this Court's case-law between "residency" and "citizenship" upon which Douglas was decided, was finally eradicated by this Court in United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and City of Camden, 465 U.S. 208, (1984). United Building concerned a challenge by construction trades of a New Jersey Treasury Department's approval of a municipal ordinance requiring a certain percentage of employees and contractors working for the City of New Jersey be residents of that City. The court reaffirmed its holding that the Privileges and Immunities test shall be applied where non-residents are treated disparately from residents:

> We cannot accept [the State's] argument. We have never read the Clause so literally as to apply it only to distinctions based on state citizenship. For example, in Mullaney v. Anderson, [cite omitted], the Court held that the Alaska Territory had no more freedom to discriminate against those not residing in the Territory than did any State to favor its own citizens. And despite some initial uncertainty, compare Travis v. Yale & Towne Mfg. Co., [cite omitted], and Blake v. McClung, [cite omitted], with Douglas v. New York, N.H. & H.R. Co., [cite omitted], and La Tourette v. McMaster, [cite omitted], it is now established that the terms

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Virginia did not recognize the doctrine of *forum non-conveniens* for FELA cases. In Gardner the Court recognized that the application of Douglas, discussed infra, was made suspect by other holdings as discussed herein, but found that its decision made the Privileges and Immunities Clause argument moot. The Tsapis case, in adopting forum non-conveniens in West Virginia, fails to discuss this issue further, and instead, in dicta, states that Douglas and its progeny has authorized such discrimination.

> "citizen" and "resident" are "essentially interchangeable..."

465 U.S. at 215.

While in Douglas, this court determined that the New York venue statute was not subject to Privileges and Immunity review, due to its use of "residency" instead of "citizen," this Court has since specifically decided that this analysis is appropriate in the facts of the Douglas case, and in the facts of the instant case. Therefore, a state statute which opens its Courts selectively based upon the claimants' residency is only constitutional if:

> (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against non-residents bears a substantial relationship to the states objective. [citation omitted]. In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means.

Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284, (1985).

Access by non-residents to the Courts of another state is a "fundamental right" for purposes of Privileges and Immunities analysis. *See, e.g.*, New York v. O'Neill, 359 U.S. 1, (1959), McKnett v. San Francisco Rwy. Co., 292 U.S. 230, (1934). Thus, the first question this Court must address is whether there is a substantial reason for the difference in treatment. In Supreme Court of Virginia, et al. v. Friedman, 487 U.S. 59, (1988), the appellant offered two justifications for the state's refusal to admit non-residents to the bar of Virginia; the lawyer's commitment to service and familiarity with Virginia law and facilitating enforcement of Virginia's full time practice requirements. This Court found these proffered justifications not sufficiently substantial given the availability of less restrictive measures to address these concerns. Likewise, in the instant case there is no

substantial reason for allowing dismissal of out-of-state claims when resident claims may be brought with impunity. Virginia, by enactment of very liberal venue and long-arm statutes, has arguably opened its courts to every possible claim permitted under constitutional due process, except those by non-residents. Virginia has insured, by its venue statute, that Virginians may file an unlimited number of claims while non-residents are subject to dismissal and deprivation of Virginia as a forum for their claims.

Even assuming *arguendo* that the reasons behind the statute as drafted are substantial, it is clear that the means, discrimination against non-residents, do not bear the necessary relationship to the state's objectives considering the "full panoply of legislative choices otherwise available to the state." Friedman at 67 see also, Tangier Sound Waterm[illegible]'s Assoc., et al. v. Pruitt, 4 F.3d 264 (4th Cir. 1993). If Virginia wishes to limit the total number of claims which may be brought in its courts, there are clearly less restrictive means available than singling out non-residents for exclusion. Possible less restrictive means are numerable including, but certainly not limited to, permitting dismissal of ALL claims which arise outside of the state regardless of residency; tailoring Virginia's long-arm statute more narrowly than the maximum permitted by Federal due process and more narrowly tailoring Virginia's generous venue statute which allows suit against any corporate defendant who does business in Virginia.

C. *THE DECISION BELOW PERMITS DISCRIMINATION AGAINST CLAIMANTS BASING THEIR CLAIMS ON FEDERAL LAW, UNDERMINES THE UNITY OF THE NATION AND THE GUARANTEES OF THE ARTICLE IV, CLAUSE II, AND REPRESENTS A DISHARMONY OF THE SEVERAL STATES AS TO THE INTERPRETATION OF FEDERAL LAW.*

The United States Constitution, Article VI, Sec. 2, requires that "the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with

causes of action springing from a different source". Howlett, et al. v. Rose, et al., 496 U.S. 356 at 371, (1990). Although a Virginia court is not required to entertain Federal cases, its failure to do so must be based upon a neutral procedural rule of law. This Constitutional restriction developed specifically in regard to venue laws in FELA cases filed in state court. The Supremacy Clause of the Federal Constitution requires that if the states apply the doctrine of forum *non conveniens* to bar adjudication of an FELA case they may only do so if the state "enforces its policy impartially so as not to involve a discrimination against Employer's Liability Act suits . . . .". Missouri Ex. Rel. Southern Railway Company v. Mayfield, 340 U.S. 1, 4, (1950).

To determine whether a state court is applying its procedural laws in such a way as to discriminate against a federal cause of action, the court looks to whether the state court is one of "general jurisdiction" capable of entertaining similarly situated state claims. If so, "the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under Federal law." McKnett, supra, 292 U.S. at 233 (1934). In McKnett, an Alabama state court reached a result similar to that of the trial court in Brigman. This Court has determined that a State Court's discrimination based on the source of an action is prohibited by the Federal Constitution. McKnett, a resident of Tennessee, brought a Federal Employers' Liability Act claim against his employer, St. Louis & San Francisco Railway Company, in an Alabama state court for injuries arising in Tennessee. The defendant railroad pled in abatement that the Alabama court lacked jurisdiction, as the cause of action arose under Federal statute (FELA) and neither state statute, nor common law, and was based on injuries occurring in Tennessee.[4]

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[4]The railroad's plea was based upon the language of § 5681, Code of Alabama of 1923 which stated:

> Whenever, either by common law or the statutes of another state, a cause of action, either upon contract or in tort, has arisen in such other

Judgment was entered for the defendant railroad based upon its plea, which was affirmed by the Alabama Supreme Court. The Alabama courts agreed with the railroad's argument that the Court lacked jurisdiction of McKnett's claim as it arose in another state and was based upon federal law. The Alabama Court strictly interpreted the Alabama jurisdiction statute as limiting jurisdiction for Alabama courts to out of state actions arising under common law or laws of another state and did not include actions arising under federal law. As McKnett was suing to enforce a federal act, the Alabama courts held they had no jurisdiction. However, if McKnett had been injured in Alabama, the court would have had jurisdiction. If the defendant had been a domestic corporation, the court would have had jurisdiction. If the suit had been brought for an injury suffered while engaged in intrastate commerce and thus under state statute, not federal, the Alabama court would have had jurisdiction. This Court granted *certiorari* and reversed. This Court found the ordinary jurisdiction of the Alabama court was appropriate to enforce an FELA claim and the denial of jurisdiction was a violation of McKnett's rights under the Supremacy Clause of the Federal Constitution. Id.

Likewise, had Brigman been a resident of Virginia, regardless of where his claim arose, this action could not be dismissed under the terms of § 8.01-265. In addition, according to the ruling of the trial court, if his claim was to enforce a non-federal right, his claim for asbestos related disease could not be dismissed under the terms of § 8.01-265, regardless of his residency. This result is contrary to the ruling of this Court in McKnett and the protection afforded citizens under the Federal

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> state against any person or corporation, such cause of action shall be enforceable in the courts of this State, or any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state." McKnett, supra, 292 US. at 231.

Constitution. The Federal Constitution forbids a state from closing its courts to transitory causes of action arising in other states under federal law while opening them to the litigation of all like transitory causes arising in other states under state law. A plaintiff, such as Brigman, may not be "cast out" because he sued to enforce a federal act. McKnett, 292 U.S. 234 (1934). Furthermore, Constitutional protection against such discrimination must not be subject to the differing views of the several states upon this Court's binding interpretation of the United States Constitution.

VI. CONCLUSION

For the foregoing reasons, Brigman moves this Court to grant his Petition for Appeal and issue a writ of certiorari requiring the Circuit Court for the City of Portsmouth to entertain this cause of action, and any other relief this court deems appropriate.

Respectfully submitted,

Larry W. Lockwood, Jr.

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APPENDICES

APPENDIX A
Va. Code Ann. §8.01-265 (Michie 1950)

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§ 8.01-265. Change of venue by court. - In addition to the provisions of § 8.01-264 and notwithstanding the provisions of §§ 8.01-195.4, 8.01-260) 8.01-261 and 8.01-262, the court wherein an action is commenced may, upon motion by any defendant and for good cause shown, (i) dismiss an action brought by a person who is not a resident of the Commonwealth without prejudice under such conditions as the court deems appropriate if the cause of action arose outside of the Commonwealth and if the court determines that a more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than the Commonwealth or (ii) transfer the action to any fair and convenient forum having jurisdiction within the Commonwealth. Such conditions as the court deems appropriate shall include, but not be limited to, a requirement that the defendant agree not to assert the statute of limitations as a defense if the action is brought in a more convenient forum within a time specified by the court. The court, on motion of a plaintiff and for good cause shown, may retain the action for trial. Except by agreement of all parties, no action enumerated in Category A, § 8.01-261, shall be transferred to or retained by a forum not enumerated in such category. Good cause shall be deemed to include, but not to be limited to, the agreement of the parties or the avoidance of substantial inconvenience to the parties or the witnesses.

The provisions of (i) of this section shall not apply to causes of action which accrue under § 8.01-249(4). (Code 1950, §§ 8-38, 8-157, 8-158; 1950, p. 78; 1954, c. 660; 1956, c. 432; 1956, Ex. Sess., c. 11; 1960, c. 569; 1964, c. 502; 1968, c. 386; 1979, c. 662; 1982, c. 601; 1991, c. 530.)

APPENDIX B
Va. Code Ann. §8.01-249 (Michie 1950)

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§ 8.01-249. When cause of action shall be deemed to accrue in certain personal actions.

The cause of action in the actions herein listed shall be deemed to accrue as follows:

1. In actions for fraud or mistake and in actions for rescission of contract for undue influence, when such fraud, mistake, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered;

2. In actions or other proceedings for money on deposit with a bank or any person or corporation doing a banking business, when a request in writing be made therefor by check, order, or otherwise;

3. In actions for malicious prosecution or abuse of process, when the relevant criminal or civil action is terminated;

4. In actions for injury to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma, or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician. However, no such action may be brought more than two years after the death of such person;

5. In actions for contribution or for indemnification, when the contributes or the indemnitee has paid or discharged the obligation. A third-party claim permitted by subsection A of § 8.01-281 and the Rules of Court may be asserted before such cause of action is deemed to accrue hereunder;

6. In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, physician, psychologist, or clinical psychologist. However, no such action may be brought more than ten years after the later of (i) the last act by the same perpetrator which was part of a common scheme or plan of abuse

or (ii) removal of the disability of infancy or incompetency. As used in this subdivision, "sexual abuse" means sexual abuse as defined in subdivision 6 of § 18.2-67.10 and acts constituting rape, sodomy, inanimate object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2;

7. In products liability actions against parties other than health care providers as defined in § 8.01-581.1 for injury to the person resulting from or arising as a result of the implantation of any prosthetic device for breast augmentation or reconstruction, when the fact of the injury and its causal connection to the implantation is first communicated to the person by a physician;

8. In actions on an open account, from the later of the last payment or last charge for goods or services rendered on the account. (Code 1950, §§ 8-13, 8-14; 1964, c. 219; 1966, c. 118; 1977, c. 617; 1985, c. 459; 1986, c. 601; 1991, c. 674; 1992, c. 817)

APPENDIX C

Transcript of Proceeding Before the Hon. Johnny E. Morrison, Circuit Court for the City of Portsmouth, Virginia, March 18, 1996.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

JACK P. BRIGMAN,	)	
	)	
Plaintiff,	)	
	)	
V.	)	AT LAW NO.
	)	L-95-771
CSX TRANSPORTATION, INC.,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
Portsmouth, Virginia
March 18, 1996

Before:

THE HONORABLE JOHNNY E. MORRISON, JUDGE

Appearances:

MILLER & BONDURANT
By: LARRY W. LOCKWOOD, JR., ESQUIRE RANDALL E. APPLETON, ESQUIRE Counsel for the Plaintiff

McGUIRE, WOODS, BATTLE & BOOTHE
By: JAMES F. STUTTS, ESQUIRE Counsel for the Defendant

THE COURT: Good afternoon everyone. Call the case.

THE CLERK: Jack Brigman v. CSX Transportation. Is the plaintiff ready?

MR. STUTTS: Yes.

MR. LOCKWOOD: Yes.

THE CLERK: Is the defense ready?

MR. STUTTS: I am sorry. Defense is ready.

THE COURT: Are you the plaintiff also?

MR. STUTTS: I vouch for them.

THE COURT: I have to hear the motion yet.

MR. STUTTS: Yes, Your Honor. Your Honor, James Stutts.

MR. APPLETON: Before we get going I have Mr. Moore and Mr. Joannou here to offer testimony. I don't know if you want them to sit in during the hearing.

THE COURT: It makes no difference to me. What about you, counsel?

MR. STUTTS: This is new to me. It will be fine if they stay here. I don't know who they are.

MR. STUTTS: Your Honor, we are here again on a notion to dismiss for forum non conveniens in this case. And of CSX Transportation in the Brigman case. Brigman is exactly like the cases that we argued before Your Honor three or four weeks ago in the Walker cases, and for that reason we attached as an exhibit to our motion in the Brigman case the briefs filed in those cases. Mr. Brigman was from North Carolina, is from North Carolina, and we essentially have the same cast of characters in terms of experts and witnesses that we had in the case which we argued before Your Honor three weeks ago. And at that time Your Honor sustained the motion to dismiss the case. Now, there is a distinction in this case which the plaintiff believes caused it not to be subject to section 8.01-265. It is section 8.01-265 which

is the forum non conveniens statute and which permits this Court with good cause shown to dismiss the action subject to certain conditions.

Again, Your Honor, which is exactly what you did with three other cases.

The distinction the plaintiff tries to draw in this case is the applicability of Section 8.01-249 of the Code which states that: In actions for injury to persons resulting from exposure to asbestos there is a two year statute of limitations.

And it describes when that cause of action begins to accrue.

Under 8.21 -- I am sorry. 8.01-265 it says that the provisions of one of the sections shall not apply to causes of action which accrue under 8.01-249.

It is clear from the plaintiff's motion for judgment that his cause of action accrues under federal statute, the Federal Employees Liability Act, and it does not accrue under any state statute or common law in Virginia.

Now section 8.01-249 therefore does not apply, and Section 8.01-265 does apply. 8.01-269 is for actions such as the plaintiff sues a manufacturer or supplier of asbestos products under a state cause of action. Under a

state tort. Under a state common law tort or a state statutory tort which may be created for asbestos. But not under FELA.

And as Judge Johnson, Your Honor, we have supplied you with Judge Johnson's opinion. This is the same opinion which we supplied to the Court when we were here before, which makes it very clear that first of all the cause of action accrues under 8.01-249 with an entirely different statute of limitations than 8.01-265. Rather than under FELA.

So we have two different causes of action. one, a common law cause of action. One a federal statutorily created cause of action with two different measures of when the causes of action accrued.

FELA is a three year statute of limitations that begins to run when the plaintiff knew or should have known of the injury that he complained about.

Judge Johnson dealt with that issue, actually reversed himself from an earlier decision and concluded that 8.01-265 should apply to this cause of action for an out of state plaintiff.

And we adopt as our argument, obviously, Judge Johnson's rationale and his opinion in that case.

Once having made that decision, Judge Johnson then, as he said, had no problem then sending the case back to South Carolina where it belonged. And I will say this, that the one doctor who was hired in Portsmouth for the asbestos components of this case is the same doctor who was hired in the case Judge Johnson was dealing with when he sent this back to South Carolina.

Now, there is another argument which the plaintiffs have made in their papers in opposition. And I received those papers in opposition. I have seen them for the first time today. They were sent by mail on Friday, and they have raised some constitutional arguments.

I understand, and I stand to be corrected if I am wrong, that a constitutional argument was presented to Judge Johnson by Mr. Miller the first time this case was argued, that it has been argued again, and that at least the opposing papers state that Judge Johnson has that under advisement.

If the Court has any hesitation about the constitutional issues, then obviously we would like the chance to brief that point.

I will just say that based upon the several hours that I have had to check on the cases cited by the plaintiff, particularly the McKnett v. Saint Lewis, is not apropos to this case. This was an old Alabama case in which the Supreme Court said the state of Alabama could not say that it would not take federal causes of action -- which is what the state of Alabama did -- by foreign plaintiffs. That's not the case here. They simply would not take any out of state federal causes of action.

The case that really does control is Missouri v. Mayfield, which the plaintiffs have cited, in which the Court says that states may apply their own forum non conveniens statute, which we have in this case as long as they do so in a non-discriminatory fashion. And that's exactly what we have in Virginia under 8.01-265. It does not discriminate against a FELA plaintiff. It treats all out of state plaintiffs the same.

If Virginia turns out to be an inconvenient forum, the defendant may raise that motion and ask that it be transferred. It may do it whether or not that plaintiff has the cause of absence under FELA or has a state cause of action, or some other cause of action. So it is a nondiscriminatory scheme. And that's what Missouri v. Mayfield stands for.

American Dredging Company v. Miller, 1994 case which the plaintiffs have not cited, U.S. Supreme Court, a forum non conveniens, stated that the state, I believe it was Louisiana, could apply forum non conveniens statute and cited the Mayfield case.

So there are cases, and obviously we don't address them because that was not presented to us.

We think the plaintiffs have misstated the law on the constitutional issues and would like the chance to brief that if the Court is so inclined.

But the threshold issue is does 8.01-265 apply, and we believe it does.

MR. APPLETON: Judge, if I can respond briefly. The brief that the defendants prepared I didn't receive until about Tuesday or Wednesday. So between Mr. Lockwood and myself doing some research, the quickest we could get a response brief done was by Friday, so there was no intention here to do any fast work with the pleadings. We responded as quickly as we could. In fact I stayed in office late Friday night faxing defense counsel all of the authority we cited so they would be fully informed of what our arguments were. And I would like to deal with all the issues today. The way I see it we have two issues, a statutory interpretation, and the other is a question of constitutional law. I gave you the transcript of one of the cases that came before Judge Johnson. Williams v. Norfolk Southern. Judge Johnson raised several issues dealing with the interpretation of 8.01-265 in its referral to the statute of limitations provisions.

Now, that's why I had Mr. Moore and Mr. Joannou here. Mr. Joannou was the author of the amendment that I call the asbestos savings clause, and Mr. Moore was on the Courts Committee in the House. They are both here to give you a legislative context of the formation of the amendment and the evidence that was

presented to the legislature when these amendments were passed.

I would like the put them on now. Mr. Joannou, would you come up first.

JOHN S. JOANNOU, called as a witness by and on behalf of the Plaintiff, being first duly sworn, testified as follows:

MR. STUTTS: Let me object generally to the testimony of witnesses to come in to provide the history of the statutory, of the passage of this Act. The Act speaks for itself. The statutory interpretation of statutory history it should be found in the course of Virginia we have very little written on the statutory history, but I object to the testimony.

THE COURT: Go ahead.

MR. APPLETON: Judge, if I could I am relying on the Supreme Court case Village of Arlington Heights v. Metropolitan Housing and Development Corporation. That indicates that evidence of the historical background of challenged legislation.

THE COURT: I've overruled him. Put it on the record.

MR. APPLETON: That's all I am asking is the sequence of events leading up to enactment of legislation or procedural or subsequent departures, or potentially probative of legislative purpose or motive and that's it.

JOHNNY JOANNOU, called as a witness by and on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. APPLETON:

Q. State your name for the record, please?

A. Johnny Joannou.

Q. And Mr. Joannou, in 1990 did you serve in the Virginia Senate?

A. Yes, I did.

Q. And in that capacity did you serve on the Courts committee?

A. Yes, I did.

Q. And in the Courts committee did you all consider the amendment to 8.01-265?

A. Yes.

Q. Do you need the statute in front of you or is your recollection of it -- would it help you any?

A. I can tell you what took place.

Q. Okay. Can you describe for me what you recall about the proposal of, first of all the amendment to 8.01-265 generally and then the amendment dealing with asbestos litigation?

A. Okay. What happened was legislation was presented by then Senator Stallings to change the venue statute. And to the best of my recollection part of the argument was that back in 1977 or '78 during the recodification of 8.01, that the venue had been changed in some manner and, therefore, they were taking it back to what it was. That was basically the argument that Senator Stallings was giving at that time when he put the amendment in the changed venue.

Q. Did his original amendment have the asbestos savings clause in it?

A. No.

Q. Okay. Can you tell me where that came from?

A. That was a recommendation that was made by the Virginia trial lawyers. And I forget, I can't tell you exactly who the attorney was. It was the asbestos attorney familiar with that type work, but he was short, stocky, and he was from Norfolk, and I think he was from the Glasser firm but I am not sure. Okay. I can' t remember.

Q. Did you propose the asbestos savings clause to that amendment?

A. Yes. What happened was we turned, I turned to staff and asked them to prepare an amendment that would exclude asbestos from this
venue statute.

Q. Tell me when you say turned to staff, tell me what that means.

A. The Courts committee is staffed by staff attorneys who work full time for legislative services, and the young lady that was there at the time, there were two attorneys. One was Mary Divine and one Mary Geison. And those two staff attorneys, and I don't know which one prepared the amendment. As a matter of fact I called them to find out if they remembered, and they didn't know which one had prepared the amendment. They didn't have any recollection of it.

Q. When you directed them to prepare the amendment, did you emphasize the closing of any particular terms or wording for the amendment?

A. No. That's not how the process works. The process works, you want an amendment you give the intent of the amendment to staff and they put something together. And there was no argument opposing it. Everybody agreed to the amendment. There was no fighting about the amendment.

Q. When the amendment, and I am speaking now about the general 8.01-265 venue amendment as well as the asbestos savings clause?

A. I am speaking about the amendment which excluded the asbestos. Okay, there was no argument on that.

Q. Was there ever any evidence presented to your committee that dealt with any reasons to delineate between state and federal causes of action?

A. No, I don't recall anything like that. Let me just say this was back in 1990. And I am giving you my best recollection of everything that I can remember.

Q. Was there any evidence that was presented to your committee, or that came from you personally that substantiated the using of any particular terms that were included in the amendment?

A. No. That was turned over to staff and we asked them to prepare an amendment that would accomplish excluding asbestos from the venue statute.

Q. And?

A. The new venue statute that was being proposed by Senator Stallings.

Q. Did they in fact prepare that amendment?

A. Yes, they did.

Q. And was the amendment passed by the Senate?

A. It was passed by the committee and passed by the Senate and sent over to the House of Delegates.

Q. Between the time that you directed the staff attorneys to prepare the legislation and the time that it was actually passed

by the Senate, were there any changes in the wording that you recall?

A. Not that I recall.

MR. APPLETON: Judge, I don't have any other questions of Mr. Joannou.

THE COURT: Counsel?

CROSS-EXAMINATION

BY MR. STUTTS:

Q. Good afternoon. Can you tell me the concern about putting a savings clause in 8.01-265 for making asbestos an exception?

A. The recommendation was made by the Virginia Trial Lawyers. And I think that that was something that was, that had been negotiated between the railroad and Senator Stallings and Virginia Trial Lawyers and asbestos firm *s*.

Q., What was the specific -- was there a statute of limitations concern that caused this to be excluded or excepted from 8.01-265?

A. The only thing-that I can remember is that an agreement was reached, and the amendment was asked for to exclude asbestos, and that was basically it. It wasn't to go to any certain section of the code. It was just to make sure that it was excluded.

Q. And you are aware of, are you not, under 8.01-249 when it refers to asbestos, an action to the person from asbestos exposure, that it contains a statute of limitations in there?

A. To be truthful with you I haven't even read the amendment. Or the code. I do not do work in this field so

Q. Are you aware that the statute of limitations provision that is in there is inconsistent with or different from the FELA statute of limitations?

A. No, I don't know that it is. And basically what I am saying to you is maybe I should have read it at the time. I didn't. All we did was ask for that amendment to be prepared to exclude asbestos. That's what I thought had been done. There was no argument from either side. And I was opposed to the basic amendment itself and so I have no problem with whatever it

wanted to be amended to, because I didn't particularly care for the statute to start with.

MR. STUTTS: Thank you.

MR. APPLETON: I have one more question.

REDIRECT EXAMINATION

BY MR. APPLETON:

Q. Mr. Joannou, did you ask the drafter to refer to 8.01-249 for their description of asbestos causes of action?

A. We just asked staff to prepare an amendment that would exclude asbestos.

Q. All right.

A. That's basically it pursuant to what everybody wanted, and I can remember there was a lot of heated discussion going on over the amendment itself. Because it was a relatively hot issue to the city of Portsmouth.

MR. APPLETON: Judge, I have no other questions.

THE COURT: Thank you. Can he be excused. You don't have any more questions, counsel?

MR. STUTTS: No, Your Honor.

THE COURT: You are excused.

(Witness excused)

MR. APPLETON: Judge, I call Mr. Moore, please.

WILLIAM S. MOORE, JR., called as a witness by and on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. APPLETON:

Q. State your name for the record, please?

A. Judge, you know you got the tissues down here on the floor. I hope I don't need any of those today.

William S. Moore, Jr.

Q. And are you currently in the Virginia House of Delegates?

A. Yes, I am.

Q. How long have you been in the House of Delegates?

A. Since 1984.

Q. In 1990, did you serve on Committee in the house of delegates?

A. I did.

Q. And at that time did your committee consider the amendment to 8.01-265?

A. They did.

Q. Can you describe for me how the bill -- the bill originated with Senator Stallings in the Senate, did it not?

A. That is correct.

Q. And it came to your committee from the Senate?

A. That is correct.

Q. And when it came from your committee did it have what I call the asbestos savings clause referral to 8.01-249 in it?

A. Apparently it did.

Q. When it came to your committee was there any evidence presented by either side to substantiate any type delineation between federal or state causes of action?

A. To the best of my recollection I don't recall any testimony as to make it a delineation between state and federal laws as far as asbestos was concerned.

Q. Was there any evidence presented to your committee that dealt with the specific choice of any terms, and in this case the term of accrual?

A. As I recall, it is more likely that when a bill is owed to us from the Senate with an amendment that is not, is not in contest, we wouldn't normally hear discussion about the amendment other than the general purpose. But I don't recall any specific discussions about the specific language in that amendment.

My general recollection is that the parties who had an interest in that were satisfied with the amendment to the bill.

Q. So there were no changes made by your committee?

A. Not that I can recall. I would think that there probably was not any made.

Q. And you just heard Mr. Joannou testify. Do you recall if there was any evidence presented to your committee dealing either with the delineation with the state or federal causes of action or anything binding in the amendment?

A. I don't recall any.

MR. APPLETON: I don't have any other questions, Judge.

CROSS-EXAMINATION

BY MR. STUTTS:

Q. Mr. Moore, how are you?

A. Good, thank you.

Q. I am defending a railroad and I want to take the deposition of a plaintiff and look at his records. And I may be concerned about the statute of limitations. Which one do I use? FELA, or Virginia?

A. I can't answer that question for you.

Q. This doesn't answer it either, does it?

THE COURT: He said he wasn't sure.

BY MR. STUTTS:

Q. 8.01-249 doesn't answer the question for a Virginia cause of action that it accrues when a diagnosis is given to a plaintiff, does it?

A. I believe that statute has a two year statute of limitations.

Q. And that's different from the FELA statute of limitations, is it not?

A. Apparently from hearing your opening statement to the Judge, I think that I have learned there is a 3 year statute in FELA cases. I did not know that before I came in today.

Q. And it accrues at a different time, when the plaintiff should have known or did know about his injury?

A. I don't know the difference between the two statutes.

MR. APPLETON: I have nothing further.

THE COURT: May he be excused?

MR. APPLETON: Yes, sir.

(Witness excused)

MR. APPLETON: Judge, I have some more information to give you. In my brief I told you that the Donnahoo case had been taken under a advisement by Judge Johnson. I got an opinion today at lunch time where he went with his original ruling saying that the, dismissing the Donnahoo case, and I think that you need to be aware of that.

MR. APPLETON: Judge, I got the argument before me based on the definition of accrual and what Virginia says has to happen for a cause of action to accrue.

Mr. Lockwood has done all the research on the constitutional issues. Is it okay if I speak briefly on the statute and Mr. Lockwood deal with the Constitutional issues.

THE COURT: Yes.

MR. APPLETON: Our argument is that the asbestos savings clause on the venue statute is simply a definition of a cause of action. In this case it is asbestos disease. And I base that argument on two things. The case law in Virginia says that you have to have an obligation of a defendant, to a plaintiff. You have to have commission or omission by the defendant to breaching the duty. You've got to have negligence. You've got to have damage. Without any of those things the cause of action doesn't accrue either are under FELA or 8.01-249.

I think that the intention of the legislature was to simply describe a cause of action. There is no evidence presented that there was ever any delineation between state causes of action and federal causes of action. The reference to 8.01-249 was simply something done by draftsmen, it wasn't something picked up by the legislature and say, we have to do this to confine the savings clause to state causes of action, and then the wording wasn't chosen by the legislature. It just goes to describe, in other words, who writes up a bill and it is passed.

The intention, we argue, is obvious on the face of the statute that asbestos cases were not to be subjected to discretionary dismissal. That the definition of the term comes from the Virginia common law and not from that statute. And that argument comes also from the revisor's notes that indicate that the reference to the term accrual 8.01-249-4 is simply for the purpose of applying the statute of limitations. Not for describing the type of action, or when this type of action occurs. It simply tells you when the statute of limitation is to begin to run.

And the only purpose of 8.01-249-4 was to alleviate the hardships that plaintiffs were having when asbestos cases originally came up in, medical malpractice cases originally came up in research. There were cases where people had surgical tools left

in them and if they weren't discovered within two years of the surgery the judges were dismissing them saying that the statute of limitations had run.

If the Court interprets this to dismiss the asbestos causes of action under FELA, I think that it runs contrary not only to the humanitarian purpose of FELA, but runs contrary to the humanitarian purpose of this statute which was to alleviate the hardship on plaintiffs.

MR. STUTTS: May I just address that issue, Your Honor.

THE COURT: Yes, sir.

MR. STUTTS: Your Honor, Mr. Appleton has made an argument which sounds fine if he was here in a case where he had pled a common law cause of action.

8.01-249 speaks to a common law cause of action in the Commonwealth of Virginia. Mr. Appleton says, well, this was passed to alleviate the problems that people were having similar to medical malpractice cases on the statute of limitation. So they created this special statute of limitations for asbestos.

It is still a Virginia common law cause of action. It did not change FELA. FELA is still three years, and FELA is still when a plaintiff knew, or should have known. So this refers to, and he is correct. This refers to a common law cause of action in Virginia. That happens to be something different from what they cause of action. This is irreconcilable with FELA.

And there are other provisions that would be irreconcilable with FELA. This is simply not a commonwealth cause of action.

THE COURT: All right.

Mr.Lockwood.

MR. LOCKWOOD: Your Honor, I will be absolutely as brief as possible given the --

THE COURT: No. You take your time.

MR. LOCKWOOD: Given the complex nature of the constitutional issues involved, Mr. Stutts apparently dismissed the constitutional issues as something not deserving of the Court's time, and I strongly differ.

There are three really related issues that are brought up by the statute. The first issue is the supremacy clause, and that is can a state statute make a distinction between a federal cause of action

and state cause of action in its procedure that substantially affects the federal cause of action in which, and the answer on that is, and the case law is absolutely positive. It is not an exit to the court the Howlett case for a thorough examination on this.

The Howlett case was a, is a 1990 case which interpreted, or excuse me, reviewed the United States Supreme Court case which reviewed, and it is in the packet we sent you, Your Honor.

THE COURT: All right.

MR. LOCKWOOD: The United States Supreme Court reviewed Florida's interpretation of its statute which created an exception to the common law doctrine of immunity. And that exception allowed causes of action to be brought against the states. Any state organization or municipalities and so forth under state law.

The Supreme Court of Florida interpreted that in such a way that it would not allow 19, Section 1983 cases against state municipalities.

I will just read this from, it is Lexis, page 14. These are Lexis cases.

A state policy that permits actions against state agencies for the failure of their officials to adequately place a parking lot, and for the negligence of such officers in arresting
a person on a roadside, but yet prescribes jurisdiction of federal causes of action for constitutional violations by the same persons, can be based only on the rationale that such a person should not be held liable for Section 1983 violations in the state Courts at that time.

That reason, or the preventing in terms of directing agreement for the substantive law, or simply reviewing to take cognizance of the federal cause of action flatly violates the supremacy clause. The case law clearly established that when a state rule or procedure is applied both to state causes of action and federal causes of action that are very similar in terms of the Court's jurisdiction, that the state procedure must be applied equally to the state causes of action as it is to the federal causes of action.

The construction that is urged by the defendant in this matter, that is that there is an exception for asbestos cases arising under

anything but federal law, is not a violation of the supremacy clause. A close reading of Howlett makes that absolutely clear.

In Howlett there was an exception to the state doctrine. That exception was not allowed to be applied to a federal cause of action. And that was declared to be in violation of the supremacy clause.

In this case we have an exception to the venue statute. That exception, if the urging by the defendant is successful, cannot be applied to save federal asbestosis claims. That flatly violates the supremacy clause.

A careful reading of Howlett makes it absolutely clear, although many other cases are cited, those same cases discussed in the brief are discussed in Howlett for authority for that position.

The next issue, and again they are related and often discussed in the same cases. For example. Douglas and McKnett has to do with the privileges and immunities clause. This is made very difficult because Douglas was a 1930s, case that was decided under a factual issue very similar to the one before this Court. And that is can a venue statute make a distinction between residents and non residents for purposes of dismissal under the venue statute. The Douglas case was a very old case. The Douglas case says, well, if the statute uses the term resident and not the term citizen, so it is not a privileges and immunities problem. Privileges and immunities analysis is appropriate here. That has been flatly rejected. That position that there is a distinction between resident and citizen for purposes of privileges and immunities clause analysis has been flatly rejected. It is about the 1950s. That rejection is made clear in the Municipal Buildings case cited in the brief.

In the Municipal Buildings case the United States supreme Court said, and this is, and this reference is replete in the sections of various horn books we attached to the brief.

Citizenship and residency for purposes of privileges and immunities analysis are identical. There is no difference The basis of Douglas, and the basis of cases that follow Douglas, Mayfield and a few others, simply do not any longer apply. The basis for that decision has been overruled.

And if you have a distinction based on residency, now under current United States Constitutional law, you have to have a privileges and immunities analysis. That privileges and immunities analysis has been subjected to stringent tests for due process analysis.

For example, in Friedman, page 544 Chapter 6, he equates it with due process analysis. He says it is just as stringent.

The Piper case I think bears that out. I have two cases. If I can hand these up to the Court.

THE COURT: You may. These two cases are

MR. APPLETON: Supreme Court of Virginia et al v. Freeman, a Supreme Court case decided in 1988. Privileges and immunities clause.

And the other is a Fourth Circuit case, Tangier Sound Waterman's Association, et al. v. William A. Pruitt,,Commissioner of Virginia Marine Resources Commission.

In both of these cases a Virginia statute was struck down as violative of the privileges and immunities clause.

And if I could just point to Lexis, page 5, to the Supreme Court of Virginia et al v. Friedman case, the shorter of the cases. Down in the middle the United States Supreme Court it flatly says, and this is a case reviewing Virginia statute.

While the Privileges and Immunities Clause cites the term 'Citizens,' for analytic purposes citizenship and residency are essentially interchangeable.

And it cites the United Building & Construction Trades case.

The United Building & Construction Trades case is the case which specifically referenced the Douglas case and said that while there was some misunderstanding early on, and talking about the early on case law about whether residents and citizens are to be deemed the same, the Supreme Court has finally come down on the side that citizen and residency are the same for privileges and immunities analysis.

The privileges and immunities analysis is appropriate in this case. There is no way Section 8.01.265 as it is now written can possibly withstand the analysis.

The analysis is that the state must have a substantial nondiscriminatory reason for this distinction, and in the end that

substantial nondiscriminatory reason must be substantially related to the statute.

So we have to -- I am put here in a difficult position. I have to try to imagine nondiscriminatory reasons why the legislature would want to make a distinction between the residents and nonresidents. Something other than the fact that they would prefer residents, because they vote and pay taxes, over the nonresidents, I can't think of any.

If they are trying to make access to courts more available for residents they can't do that.

If they are going to grant an absolute positive privilege for any resident to bring his cause of action that arose outside of the state, you may have to grant that same privilege to an out of state resident because they cannot discriminate against nonresidents.

And I think, for example, brings this point, at least makes it clearer for me, and that is that you have a resident of Emporia driving right across the North Carolina state line with his friend who lives right across the North Carolina state line. They are in an accident with a defendant who also lives in Virginia. But that occurs in North Carolina. They both bring a case against that Virginia resident who is driving the other automobile, and they both bring that case as a plaintiff in Virginia. In Emporia or Portsmouth. The Virginia resident is guaranteed a Virginia forum to hear his claim. He is guaranteed Virginia law. He is guaranteed the benefits of Virginia statutes. And that person who lives maybe just a few inches over the line, that nonresident is not in a factual identical situation. One is allowed to stay. The other is subject to dismissal.

I think that it is a clear violation of the privileges and immunities clause.

Following, Your Honor, I comment to the Court a careful analysis of this very difficult issue. For example, the kind of confusion that can occur.

Mr. Stutts cited American Dredging v. Miller for the proposition that a state can apply its forum non conveniens law to dismiss FELA cases. We don't dispute that. Virginia has, I believe, come down squarely on that in Caldwell that FELA

provides no additional benefit to a FELA plaintiff over a non FELA plaintiff.

That's not the issue. The issue is does the interpretation as urged by the defendant in terms of accrual discriminate in violation of the supremacy clause, and is the statute as written a violation of the privileges and immunities clause. Do they treat residents and nonresidents equally.

If not, is that unequal treatment allowed under the constitution. Not whether a FELA case is subject to dismissal. Assuming all other things being equal.

That's all I have to say until unless you have some questions, Your Honor.

MR. STUTTS: Your Honor, I hope there was nothing in my remarks that caused the Court to believe that I didn't take the constitutional issue seriously. Mr. Lockwood said that I gave him short shrift, and I think I gave an explanation.

I understand Mr. Appleton's problem, and my experience with him has been just as he said. He is not trying to sandbag me, but the fact is that I got a stack of papers about this thick with cases and citations from Laurence Tribe and others that I haven't had the chance to deal with except in a very cursory fashion. Enough of a cursory fashion to be able to make at least a couple of comments, but I would like to have the opportunity to brief the issue more detailed on the constitutional issues.

Unlike the Bennett case in Alabama, what the Court declined to take cognizance of, the federal cause of action, Virginia courts have not declined to take cognizance of FELA cases, they simply have adopted the forum non conveniens statute, and applied them to FELA cases.

I think that he has the discrimination issue wrong between residents and nonresidents. All nonresidents are treated the same. His argument almost seems to be one that says Virginia cannot have a forum non conveniens statute and that applies to nonresidents. Under any circumstances we have a forum non conveniens
statute. The plaintiff can file a FELA case, who is out of state, and if he overcomes the forum non conveniens statute he continues

with his case in the state of Virginia. And that's true of any other out of state plaintiff. So there is no discrimination here.

Again, we would like to have the chance to brief that in more detail.

The letter, Your Honor, from Judge Johnson, as I had first understood it, this was, he was going back against what he had said in his January 30 case. But apparently he was restating that he was correct. That in January 30, when he ruled in that case 8.01-265 does apply, and that the case should be dismissed. He has said upon reflection and further argument, I still continue to believe that's the case. So we will cite Judge Johnson's original opinion letter and this letter of Friday in support.

And, Your Honor, again, if you, the Court is inclined to want to hear more on the constitutional issue we would like the opportunity to brief that.

THE COURT: Do you have anything in addition to that?

MR. LOCKWOOD: I have a very brief response, Your Honor. Very brief.

If I understand Mr. Stutts' comment correctly he said it is not a privileges and immunities problem because we discriminate against all nonresidents equally. I think he is confusing privileges and immunities and the supremacy clause. This is not an easy issue. Certainly that's why I attached so many hornbooks.

But when you look at it carefully it becomes crystal clear, at least it has in my, mind. First, you cannot use a state procedure law and treat a federal cause of action with the very similar, and again the Howlett case makes this perfectly clear. It says that you can being a suit against the superintendent of the schools because he hits and runs the car. But you can't bring a suit in state court for violating your rights under section 1983. You can't do that. It is a violation of the supremacy clause, and that was an exception granted to bring suits, and they made an exception to the exception for federal causes of action.

That is what the defendant's position seeks to do. Clearly, that's a supremacy clause issue that should be made distinct from the immunities clause issue. That is if you are going to do something you have to do it for residents and nonresidents alike. And if you don't, you have to have a darn good reason to do it,

and you have to have a close substantial relationship between the two. That's the privileges and immunities issue. Something distinct, also distinct whether you can grant forum non conveniens in a FELA case, that has been unequivocally ruled upon by the Virginia Supreme Court. And I found the cite. I would like -- I meant to read it to the Court.

Tribe on American Constitutional law.
The Standard Review by Piper and Camden.
Privileges and immunities case, 5434 chapter 6.

Characterized by a shift in the burden of proof to the discriminating state and by an insistence on a fairly precise fit between remedy and classification is almost as demanding as that elaborated by the Warren Court in equal protection and First Amendment strict scrutiny. 544, in the dead center of Tribe.

I think my example makes it clear the Privileges and Immunities clause prohibits directly against common discrimination that Virginia by its statute seeks to employ.

In terms of privileges and immunities analysis and a close fit required between the end and means, I tender Tangier Sound Waterman's Association, one of the cases that I handed up. It discusses the fact that out of state or nonresident commercial fishermen are required to pay a $1,500 license. And in state residents are required to pay a substantially lesser license of $350.

The state tried to justify this by saying that, well, our taxes pay to regulate the fisheries, to pay for people to enforce the statute, to provide emergency medical attention, or emergency attention to commercial fisherman outside of the waters.

And the Court stated flatly that there has to be, if you are going to do that, make a distinction in terms of the fees, you've got to prove exactly how much the nonresidents are costing you and you have to divvy it up appropriately.

The only rationale for excluding nonresidents from Virginia Courts is that it creates a burden on the taxpayers of Virginia Courts. That's the only argument that we can come up with. A nondiscriminatory argument, and it has to be closer than a flat exclusion of all nonresident claims. simply a violation of the privileges and immunities clause, Your Honor.

THE COURT: Take a recess and I want to review these two cases here.

MR. APPLETON: Judge, can I ask one question. I'm not sure about this. I got a notice on a whole list of cases. And the only cases that I am familiar with is Parrish v. CSX. I have factual arguments that may be appropriate to some of the other cases. I don't dispute what Mr. Stutts says about the Court having ruled on some of these issues before. But I have cases from Hamlet, Rocky Mount. Florence, some of them deal with asbestos and some of them deal with asbestos and solvents, and I think they are geographical issues and they are expert witness issues. If they are different types of cases, and I don't know if you want to get into those differences now or if you -- what we could do if he is going to come back on constitutional issues, I can come back and address those later, or I can address them to you in a letter. It is a pretty simple argument.

THE COURT: Let me read the two cases first and let's move forward.

(Recess)

THE COURT: All right, counsel. I did have an opportunity to examine these two cases that were submitted today.

And Mr. Appleton, as to your concern about the other cases --

MR. APPLETON: Yes, sir.

THE COURT: We have motion days normally and we rotate. So I don't want other lawyers to get the feeling that I have been designated as the Judge to hear all of these motions. The only thing that I am going to consider is the cases that are before me today. I don't think that I need to continue this matter to give him an opportunity, he being the defendant, an opportunity to deal with the competition issue.

I am going to rule in the defendant's favor and grant the motion. Okay.

MR. STUTTS: Thank you, Your Honor.

THE COURT: Is there a order? Get it to me.

MR. APPLETON: We note an exception, of course, to that.

THE COURT: Sure. Sure. Sure.

CERTIFICATE OF COURT REPORTER I, Richard W. Zahn, court reporter, do hereby certify that I recorded verbatim the proceedings in the Circuit Court of Portsmouth, Virginia, in the captioned cause, heard by the Honorable JOHNNY E. MORRISON, Judge of said Court, on March 18, 1996.

I further certify that the foregoing transcript, numbering pages 1 through 45, inclusive, constitute a true, accurate and complete transcript of said proceedings.

Given under my hand this 25th day of March, 1996.

/S/

APPENDIX D

Order of the Circuit Court of Portsmouth, Virginia Granting Respondent's Motion to Dismiss dated January 31, 1997.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

JACK P. BRIGMAN	)	
	)	
Plaintiff,	)	
	)	LAW NO. 95-771
v.	)	
	)	
CSX TRANSPORTATION, INC.,	)	
	)	
Defendant.	)	

ORDER

This cause came to be heard on the Defendant CSX Transportation, Inc.'s Motion to Dismiss for Forum Non Conveniens, CSXT's Memorandum in Support of Defendant CSX Transportation, Inc.'s Motion to Dismiss for Forum Non Conveniens, Plaintiffs Memorandum in Opposition to Defendant's Motion to Dismiss for Forum Non Conveniens, and was argued by counsel.

Upon consideration whereof, it appearing to the Court that the plaintiff is not a resident of the Commonwealth of Virginia, that there is a more convenient forum which has jurisdiction over all parties available in Hamlet, North Carolina, that there may be more than one convenient forum, and that substantial inconvenience to the parties or the witnesses would be avoided by a dismissal of this action under Virginia Code § 8.01-265(i), it is accordingly,

ORDERED that the defendant's Motion to Dismiss be, and it is hereby, granted subject to the condition that the defendant

agree to the tolling of the statute of limitations for ninety days from the date of entry of this order if the action is brought in a state court or a federal court in North Carolina which has jurisdiction over Hamlet, or in another forum which is ultimately determined to be a more convenient forum by a court located within that forum, within ninety days from the entry of this Order; and it is further ORDERED that this action be, and it is hereby, dismissed without prejudice, to which action of the Court the plaintiff by counsel duly excepted.

The plaintiff objects to the dismissal of this action based upon those grounds stated in his brief and presented to this Court in oral argument, namely:

1. That the reference to § 8.01-249(4) by Virginia Code § 8.01-265 is merely a description of an action, namely asbestos disease litigation, and is not meant to exclude from the prohibition against the dismissal of any asbestos disease claims arising under any federal statute,

2. That if the provisions of § 8.01-265 provide for separate treatment of federal and state causes of action such discrimination against federal actions violates the Supremacy Clause of the United States Constitution.

3. That the disparate treatment by non-resident parties under the provisions of § 8.01-265, is a violation of the privileges and immunities clause of the United States Constitution.

ENTERED: 1/31/97

S/Johnny E. Morrison
JUDGE
Circuit Court for the City of Portsmouth

I ASK FOR THIS:

S/ James F. Stutts
James F. Stutts, Esquire
McGuire, Woods, Battle & Boothe, L.L.P.

One James Center
901 East Cary Street
Richmond, Virginia 23219

SEEN AND OBJECTED TO AS NOTED ABOVE:

S/ Joseph A. Miller
Joseph A. Miller, Esquire
MILLER & BONDURANT, LTD.
706 London Boulevard at Green Street
Portsmouth, Virginia 23704

APPENDIX E
Petition for Appeal to the Supreme Court of Virginia dated April 15, 1997

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO:

JACK P. BRIGMAN
Appellant,

v.

CSX TRANSPORTATION, INC.
Appellee.

PETITION FOR APPEAL

Randall E. Appleton (VSB # 21792)
Larry W. Lockwood, Jr. (VSB # 38886)
MILLER & BONDURANT, LTD.
706 London Boulevard
Portsmouth, Virginia 23704
757/397-4677

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IN THE SUPREME COURT OF VIRGINIA
At Richmond

JACK P. BRIGMAN,	)	
	)	
Appellant,	)	
	)	
v.	)	Record No.
	)	
CSX TRANSPORTATION, INC.,	)	
	)	
Appellee.	)	

JACK P. BRIGMAN'S PETITION FOR APPEAL

I. STATEMENT OF MATERIAL PROCEEDINGS

Jack P. Brigman ("Brigman"), appellant, filed a Motion for Judgment pursuant to 45 U.S.C. § 51, et seq ("FELA") in the Circuit Court of the City of Portsmouth against CSX Transportation, Inc. ("CSX"). Brigman alleged he had suffered personal injuries caused by exposure to various chemical solvents and asbestos dust during his employment by CSX or its corporate predecessors in interest. Brigman is a resident of North Carolina having worked for the Appellee in Hamlet, North Carolina. His asbestos disease was diagnosed by Dr. James V. Scutero, a Portsmouth pulmonary specialist on April 13, 1995.

On March 18, 1996, the parties appeared before the Honorable Johnny E. Morrison pursuant to a Notice and Motion to Dismiss filed by the Appellee pursuant to § 8.01-265 of the Code of Virginia. Brigman presented a Memorandum of Law in Opposition to CSX's Motion to Dismiss based upon the final sentence of § 8.01-265 which excludes causes of actions for asbestos disease from discretionary dismissal. Brigman also presented the testimony of the Honorable William S. Moore, Jr.,

a former member of the House of Delegates, and Johnny S. Joannou, a former member of the State Senate. Each witness was a member of the Courts of Justice Committee of their legislative branch when the present version of § 8.01-265 was passed by the Virginia legislature and their testimony under oath provides the only legislative history available on the statute.

CSX presented a Memorandum of Law in Support of its Motion to Dismiss and oral argument that Brigman's cause of action accrued under the FELA, not § 8.01-249, and was not excluded from discretionary dismissal by the language of § 8.01-265.

On January 31, 1997, the Honorable Johnny E. Morrison entered an Order granting CSX's motion and dismissing this action.

II. ASSIGNMENTS OF ERROR

The trial court erred in dismissing Brigman's cause of action for the following reasons:

1. The grant of the authority to dismiss claims filed by residents of other states and the denial of the authority to dismiss claims filed by residents of Virginia under § 8.01-265 is an impermissible discrimination against residents of another state under Article IV, Section 2, of the United States Constitution.

2. The exercise of discretionary dismissal of a case arising under a federal statute (FELA), but precluded in a cause of action arising under state law is an impermissible discrimination against federal actions prohibited by the Supremacy Clause and Privileges and Immunities Clause of the United States Constitution.

3. The prohibition against discretionary dismissal of asbestos cases as recited in § 8.01-265 is applicable to FELA claims because the reference to § 8.01-249(4) by § 8.01-265 is simply a description of a cause of action as nothing "accrues" under § 8.01-249(4).

III. STATEMENT OF FACTS

Brigman was a carman employed by CSX in its Hamlet, North Carolina, shops from 1971 to 1995. He has been diagnosed by Dr. James V. Scutero as suffering from asbestosis due to his exposure to asbestos dust while in the employ of CSX. Numerous

physicians in Tidewater have also examined and treated a neurological impairment Brigman suffers due to his exposure to toxic solvents while employed by the Railroad.

At the hearing upon the defendant's Motion to Dismiss, former Senator Johnny S. Joannou and former Delegate William S. Moore, Jr. testified that when the revision to § 8.01-265 was considered by the Virginia Senate and House of Delegates, no evidence or debate was presented concerning the intent to distinguish federal from state causes of action when applying the prohibition of discretionary dismissal to causes of action alleging injury due to asbestos exposure.

Senator Joannou proposed the "asbestos savings clause" which is currently found in § 8.01-265. The purpose of such a clause was to exclude asbestos litigation from discretionary dismissal under § 8.01-265 (March 18, 1996, Transcript pp. 14 and 17). At the time the statute was amended, no evidence was presented to the Senate or House supporting a delineation between state and federal causes of action. (March 18, 1996, Transcript pp. 15 & 21) Brigman contends the referral by § 8.01-265 to § 8.01-249(4) is simply a description of convenience.

Following the presentation of the testimony of the witnesses Judge Morrison granted the Motion to Dismiss this cause of action. The parties contested the wording to be included in the Dismissal Order with the Order finally being entered by Judge Morrison on January 31, 1997.

IV. QUESTIONS PRESENTED

1. May § 8.01-265 of the Code of Virginia constitutionally grant selective exclusion to Virginia's Courts based upon state residency classifications?

2. May § 8.01-265 of the Code of Virginia constitutionally grant selective exclusion to Virginia's Courts based upon the classification of the action as one arising under State, instead of Federal, law?

3. Was the intent of the Legislature in incorporating the description of an action for asbestosis in § 8.01-249(4) of the Code of Virginia to distinguish between causes of action for illnesses arising under State, and not Federal, law?

V. ARGUMENT

1. MAY § 8.01-265 OF THE CODE OF VIRGINIA CONSTITUTIONALLY GRANT SELECTIVE EXCLUSION TO VIRGINIA'S COURTS BASED UPON STATE RESIDENCY CLASSIFICATIONS?

Article IV, Section 2 of the United States Constitution, commonly referred to as the "Privileges and Immunities Clause," or "Comity Clause," provides that "the Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The purpose of Article IV was principally to "help fuse into one Nation a collection of independent, sovereign states." Toomer v. Witsell, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

The Virginia venue statute, § 8.01-265, permits a "resident" to bring a suit in Virginia regardless of the situs of the occurrence giving rise to the suit. When such a suit is brought, the statute guarantees that a resident litigant's cause of action shall not be dismissed and shall be afforded the benefit of the Virginia forum. The Virginia venue statute, however, specifically permits discretionary dismissal of a claim by a "non-resident" under an identical factual scenario.

Whether such a provision is permissible under the Privileges and Immunities Clause of the United States Constitution was first decided by the United States Supreme Court in Douglas v. New York, N.H. & H. R. Co., 279 U.S. 377, 49 S. Ct. 355 (1929). The Douglas case concerned a New York civil procedure statute which permitted the court in its discretion to "dismiss an action by a citizen of another state but not an action brought by a citizen of New York, which last it cannot do." Id. 49 S. Ct. at 356. The Douglas court construed the New York statute narrowly finding that it discriminated on the basis of "residency" and not "citizenship." Since the Privileges and Immunities Clause applied only to discrimination based upon "citizenship" and did not apply to the questioned statute which dealt only with "residency" the statute was found to be Constitutionally acceptable. The Douglas decision became authority which provided the basis upon which other deci-

sions supporting discrimination against non-residents on the issue of *forum non-conveniens* was permitted. See generally, Norfolk & Western Rwy. Company v. Tsapis, 184 W. Va. 231, 400 S.E.2d 239, 241-42 (W. Va. 1990).[5]

However, the distinction between "residency" and "citizenship" upon which Douglas was decided, was eradicated by the United States Supreme Court in United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and City of Camden, 465 U.S. 208, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984). United Building concerned a challenge by construction trades of a New Jersey Treasury Department's approval of a municipal ordinance requiring a certain percentage of employees and contractors working for the City of New Jersey be residents of that City. The court reaffirmed its holding that the Privileges and Immunities test shall be applied where non-residents are treated disparately from residents:

> We cannot accept [the State's] argument. We have never read the Clause so literally as to apply it only to distinctions based on state citizenship. For example, in Mullaney v. Anderson, [cite omitted], the Court held that the Alaska Territory had no more freedom to discriminate against those not residing in the Territory than did any State to favor its own citizens. And despite some initial uncertainty, compare Travis v. Yale &

[5] Tsapis was a rehearing to consider the holding of a previous case, Gardner v. Norfolk & Western Rwy. Co., 179 W. Va. 724, 372 S.E.2d 786 (1988). In Gardner, the Court found that West Virginia did not recognize the doctrine of *forum non-conveniens* for FELA cases. In Gardner the Court recognized that the application of Douglas, discussed infra, was made suspect by other holdings as discussed herein, but found that its decision made the Privileges and Immunities Clause argument moot. The Tsapis case, in adopting forum non-conveniens in West Virginia, fails to discuss this issue further, and instead, in dicta, states that Douglas and its progeny has authorized such discrimination.

> Towne Mfg. Co., [cite omitted], and Blake v. McClung, [cite omitted], with Douglas v. New York, N.H. & H.R. Co., [cite omitted], and La Tourette v. McMaster, [cite omitted], it is now established that the terms "citizen" and "resident" are "essentially interchangeable..." 465 U.S. at 215.

While the Douglas court did not examine the venue statute in question as subject to Privileges and Immunity review, due to the use of "residency" instead of "citizen," the Supreme Court has specifically decided that this analysis is appropriate in the facts of the Douglas case, and, by application, in the instant case. Therefore, a state statute which treats individuals differently based upon their residency is only constitutional if:

> (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against non-residents bears a substantial relationship to the states objective. [citation omitted]. In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means.

Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284, 105 S. Ct. 1272, 1278, 84 L. Ed. 2d 205 (1985).

Access by non-residents to the Courts of another state is a "fundamental right" for purposes of Privileges and Immunities analysis. *See, e.g.*, New York v. O'Neill, 359 U.S. 1, 79 S. Ct. 564, 3 L. Ed. 2d 585 (1959), McKnett v. San Francisco Rwy. Co., 292 U.S. 230, 54 S. Ct. 690, 78 L. Ed. 1227 (1934). Thus, the first question this court must address is whether there is a substantial reason for the difference in treatment. In Supreme Court of Virginia, et al. v. Friedman, 487 U.S. 59, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988), the appellant offered two justifications for the state's refusal to admit non-residents to the bar of Virginia; the lawyer's commitment to service and familiarity with Virginia law and facilitating enforcement of Virginia's full time practice requirements. The Supreme Court

found these proffered justifications not sufficiently substantial given the availability of less restrictive measures to address these concerns. Likewise, in the instant case there is no substantial reason for allowing dismissal of out-of-state claims when resident claims may be brought with impunity.

Virginia, by enactment of very liberal venue and long-arm statutes, has arguably opened its courts to every possible claim permitted under constitutional due process, except those by non-residents. Virginia has insured, by its venue statute, that Virginians may file an unlimited number of claims while non-residents with bona fide claims are subject to dismissal and deprivation of Virginia as a forum for their claims.

Even assuming arguendo that the reasons behind the statute as drafted are substantial, it is clear that the means, discrimination against non-residents, do not bear the necessary relationship to the state's objectives considering the "full panoply of legislative choices otherwise available to the state." Friedman at 67 and see Tangier Sound Waterman's Assoc., et al. v. Pruitt, 4 F.3d 264 (4th Cir. 1993). If Virginia wishes to limit the total number of claims which may be brought in its courts, there are clearly less restrictive means available than singling out non-residents with bona fide claims for exclusion. Possible less restrictive means are numerable including, but certainly not limited to, permitting dismissal of ALL claims which arise outside of the state regardless of residency; tailoring Virginia's long-arm statute more narrowly than the maximum permitted by Federal due process and more narrowly tailoring Virginia's generous venue statute which allows suit against any corporate defendant who does business in Virginia.

2. MAY § 8.01-265 OF THE CODE OF VIRGINIA CONSTITUTIONALLY GRANT SELECTIVE EXCLUSION TO VIRGINIA'S COURTS BASED UPON THE CLASSIFICATION OF THE ACTION AS ONE ARISING UNDER FEDERAL, INSTEAD OF STATE, LAW?

The United States Constitution requires that "the courts of the several states must remain open to such litigants on the same basis

that they are open to litigants with causes of action springing from a different source". Howlett, et al. v. Rose, et al., 496 U.S. 356 at 371, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). A Virginia court is not required to entertain FELA cases, however, failure to do so must be based upon a neutral procedural rule of law. This Constitutional restriction developed specifically in regard to venue laws in FELA cases filed in state court. The Supremacy Clause of the Federal Constitution requires that if the states apply the doctrine of forum non conveniens to bar adjudication of an FELA case they may only do so if the state "enforces its policy impartially so as not to involve a discrimination against Employer's Liability Act suits . . . .". Missouri Ex. Rel. Southern Railway Company v. Mayfield, 340 U.S. 1, 4, 71 S. Ct. 1, 3, 95 L. Ed. 3 (1950).

To determine whether a state court is applying its procedural laws in such a way as to discriminate against a federal cause of action, the court looks to whether the state court is one of "general jurisdiction" capable of entertaining similarly situated state claims. If so, "the privileges and immunities clause of the Federal Constitution requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords its own citizens." McKnett, supra, 54 S. Ct. at 691, 292 U.S. at 233 (1934).

In McKnett, an Alabama state court reached a result similar to that of the trial court in Brigman. The United States Supreme Court found discrimination based on the source of an action to be prohibited by the Federal Constitution. McKnett, a resident of Tennessee, brought a Federal Employers' Liability Act claim against his employer, St. Louis & San Francisco Railway Company, in an Alabama state court for injuries arising in Tennessee. The defendant railroad pled in abatement the Alabama court lacked jurisdiction, as the cause of action arose under Federal statute (FELA) and neither state statute, nor common law, and was based on injuries occurring in Tennessee.[6]

---

[6]The railroad's plea was based upon the language of § 5681, Code of Alabama of 1923 which stated:

Judgment was entered for the defendant railroad based upon its plea, which was affirmed by the Alabama Supreme Court. The Alabama courts agreed with the railroad's argument that the Court lacked jurisdiction of McKnett's claim as it arose in another state and was based upon federal law. The Alabama Court strictly interpreted the Alabama jurisdiction statute as limiting jurisdiction for those courts to out of state actions arising under common law or laws of another state and did not include actions arising under federal law. As McKnett was suing to enforce a federal act, the Alabama courts held they had no jurisdiction. However, if McKnett had been injured in Alabama, the court would have had jurisdiction. If the defendant had been a domestic corporation, the court would have had jurisdiction. If the suit had been brought for an injury suffered while engaged in intrastate commerce and thus under state statute, not federal, the Alabama court would have had jurisdiction. The United States Supreme Court granted certiorari and reversed. The U.S. Supreme Court found the ordinary jurisdiction of the Alabama court was appropriate to enforce an FELA claim and the denial of jurisdiction was a violation of McKnett's rights under the Privileges and Immunities Clause of the Federal Constitution.

Likewise, had Brigman been a resident of Virginia, regardless of where his claim arose, this action could not be dismissed under the terms of § 8.01-265. According to the ruling of the trial court, if his claim was to enforce a non-federal right, his claim

---

> Whenever, either by common law or the statutes of another state, a cause of action, either upon contract or in tort, has arisen in such other state against any person or corporation, such cause of action shall be enforceable in the courts of this State, or any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state." McKnett, supra, 54 S.Ct. at 690, 292 US. at 231.

could not be dismissed under the terms of § 8.01-265. This result is contrary to the ruling of the United State Supreme Court in McKnett and the protection afforded citizens under the Federal Constitution. The Federal Constitution forbids a state from closing its courts to transitory causes of action arising in other states under federal law while opening them to the litigation of all like transitory causes arising in other states under state law. A plaintiff, such as Brigman, may not be "cast out" because he sued to enforce a federal act. McKnett, 54 S. Ct. 692, 292 U.S. 234 (1934).

3. WAS THE INTENT OF THE LEGISLATURE IN INCORPORATING THE DESCRIPTION OF AN ACTION FOR ASBESTOSIS IN § 8.01-249(4) OF THE CODE OF VIRGINIA TO DISTINGUISH BETWEEN CAUSES OF ACTION FOR ILLNESSES ARISING UNDER STATE, AND NOT FEDERAL, LAW?

Virginia Code § 8.01-265 excludes from discretionary dismissal all cases based upon an injury caused by exposure to asbestos dust. The nature of these claims excluded from dismissal is described in § 8.01-265 by referral to the statute of limitation provision of § 8.01-249(4) which describes when the statute of limitation begins to run on an asbestos disease claim. The trial court has ruled the referral by § 8.01-265 to § 8.01-249(4) limits to exclusion from discretionary dismissal to asbestos disease cases which "accrue" under § 8.01-249(4) and not to FELA claims which arise under federal statute.

Section 8.01-249(4) is not an "accrual" statute. The purpose of that statute is to alleviate the harsh results that occurred when a two year statute of limitation was applied to disease or latent injury cases under common law. Locke v. Johns-Mansville Corporation, 221 Va. 951, 275 S.E.2d 900 (1981), Hawks v. DeHart, et al., 206 Va. 810, 146 S.E.2d 187 (1966).

For a cause of action to arise in Virginia four elements are essential:

1. A legal obligation of the defendant to the claimant

2. A commission or omission by the defendant breaching that duty

3. Negligence of defendant occasioning the breach

4. Harm to the claimant as a proximate consequence of the breach

See Sides v. Richard Machine Works, Inc., 406 F.2d 445, 446 (4th Cir. 1969); Large v. Bucyrus-Erie Co. and Northwest Engineering Co., 707 F.2d 94, 96 (4th Cir. 1983); Locke v. Johns Manville, 221 Va. at 957. Statute of limitation provisions do not describe the origin of a cause of action. They are simply "intended to require prompt assertion of an accrued right of action" Id.

Contrary to the assertion of CSX at the trial level, "accrue" in this case is simply a term of convenience chosen by a draftsman to refer to asbestos cases generally. The use of "accrue" in the § 8.01-265 reference to asbestos cases was not chosen by the legislature to limit the exception to the exercise of discretionary dismissal to asbestos injury cases arising solely under Virginia statute. As Senator Joannou testified at the trial level, no particular wording was specified for use by the draftsman of § 8.01-265 (March 18, 1996, Transcript p. 16) and no evidence was presented to the Virginia Senate Committee considering the passage of § 8.01-265 to delineate between state and federal causes of action in the application of § 8.01-265 (March 18, 1996, Transcript p. 15). The testimony of Senator Joannou was supported by the recollection of Delegate William S. Moore, Jr. and the passage of § 8.01-265 by the Virginia House of Delegates (March 18, 1996, Transcript pp. 21-22). The inartful choice of wording by the legislative draftsman has caused confusion among the Circuit Courts. [See the ruling of the Honorable Randall Johnson in his ruling in Williams v. Norfolk Southern Railway Co., LA-1984-4, Circuit Court of the City of Richmond (1995), Williams (March 18, 1996, Transcript p. 13), which he later reversed in Donnahoo v. Norfolk Southern, LA-2450-4, Richmond Circuit Court, (1996)]. The guidance of this Court is necessary to interpret this statute.

VI. CONCLUSION

For the foregoing reasons, Brigman moves this Court to grant his Petition for Appeal and issue a writ of certiorari requiring the Circuit Court for the City of Portsmouth to entertain this cause of action, and any other relief this court deems appropriate.

Respectfully submitted,

S/ Randall E. Appleton
Randall E. Appleton

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CERTIFICATE OF SERVICE AND REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 5:17(E) of the Rules of the Supreme Court of Virginia, the petitioner certifies as follows:

(1) The Appellant in this case is Jack P. Brigman and the Appellee is CSX Transportation, Inc. The Appellant is represented by Randall E. Appleton and Larry W. Lockwood, Jr., Miller & Bondurant, Ltd., 706 London Boulevard, Portsmouth, Virginia 23704, telephone number (757) 397-4677.

The Appellee is represented by James F. Stutts, McGUIRE, WOODS, BATTLE & BOOTHE, One James Center, 901 East Cary Street, Richmond, VA 23219, telephone number (804) 775-1047.

(2) A copy of the Petition for Appeal has been mailed, postage prepaid, on April 15th, 1997, to counsel for the Appellee.

(3) Counsel for the petitioner respectfully requests permission to state orally to a panel of this Court the reasons why

(3) Counsel for the petitioner respectfully requests permission to state orally to a panel of this Court the reasons why the Petition for Appeal should be granted, and counsel further requests this oral argument be made in person.

S/ Randall E. Appleton
April 15th, 1997

APPENDIX F
Order Denying Petitioner's Petition for Appeal to the Supreme Court of Virginia dated August 18, 1997.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 18th *day of* August, 1997.

Jack P. Brigman,

Appellant,

against

Record No. 970782
Circuit Court No. L-95-771

CSX Transportation, Inc.,

Appellee.

From the Circuit Court of the City of Portsmouth

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:
David B. Beach, Clerk

By: /S/ David B. Beach
Deputy Clerk